IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 832

BEATRICE FOODS CO.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT (AND APPENDICES).

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Beatrice Foods Co. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered herein. (Judgment appears as Appendix C.)

OPINIONS BELOW.

The opinion of the Court of Appeals has not yet been reported and is printed as Appendix A hereto. (Petitioner raises no point here as to Section 1 of the opinion, "Challenge to the grand jury array" pp. 29 to 37 *infra*, and it will be unnecessary for this Court to study those pages.)

JURISDICTION.

Judgment of the Court of Appeals was entered January 2, 1963. Jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1). Time for this petition was extended by Mr. Justice Brennan to February 27, 1963.

QUESTIONS PRESENTED.

1.

May a criminal conviction under the Sherman Act be permitted where the Government's direct evidence expressly negatives the conspiracy charged and its circumstantial evidence is as consistent with innocence as with guilt?

2.

Where the prosecutor repeatedly argues to the jury that he has proved a "blatant" crime other than the one charged in the indictment (and also has proved the one charged), is it a violation of due process and of the right to an indictment specifying the nature and cause of the accusation for the court to instruct the jury that it must find the defendant guilty if it believes the other, non-alleged crime was proved?

3.

In what at best for the Government is a close or doubtful criminal case has a defendant's right to a fair jury trial been properly weighed when a court fails to consider the cumulative prejudice of multiple evidentiary and instructional errors?

4.

Where a timely, sworn motion is made for dismissal of an indictment (and for production of the grand jury minutes to support the averments of the motion), because the

prosecutor invaded the province of the grand jury and procured the indictment by accusing witnesses of perjury, by repeatedly stating that the crime, the possible existence of which was for the jury to determine, had in fact been committed, and by making other evaluative statements, is it a denial of due process and a defendant's right of confrontation for the District Court to refuse access to the jury minutes, to examine them *in camera* and then hold that the motion to dismiss should be denied because, in the District Court's opinion, the minutes did not support the motion?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Constitution of the United States, Amendments V and VI.
15 U. S. C. 1, 26 Stat. 209 (Sherman Act).
15 U. S. C. 16(a), 38 Stat. 731 (Clayton Act).
(Texts are set forth in Appendix D.)

STATEMENT.

Petitioner was indicted for allegedly conspiring with Roberts Dairy Company and Alamito Dairy Company to eliminate and suppress competition in the sale of milk and cream to Offutt Air Force Base and to United States Veterans Hospital, both near Omaha, from January 1954 to April 1957.

The indictment, as the Court of Appeals recognizes (p. 48, *infra*), was "very confined"; it did *not* charge defendants with illegally maintaining uniform prices, although the fact, necessarily well known to the grand jury, was that there were uniform prices to the public and to dealers in the Omaha area before, during, and after the indictment period. The indictment alleged no illegality in this. On so-called bid business with large consumers such

as hospitals and the Air Base, members of the industry, including defendants, offered *non-uniform discounts, i.e., non-uniform net prices, from the prevailing wholesale price.*

The indictment specified the asserted crime was (1) "to fix and establish [not *uniform*, but] *non-competitive* prices and discounts for milk and cream sold to Offutt Air Force Base" and to Veterans Hospital, and (2) to allocate to Roberts Dairy the business of Veterans Hospital and to allocate to Alamito and Beatrice alternately the business at the Air Force Base (Ct. File pp. 1-8).[1]

The asserted conspiracy thus was alleged not to be in the general market area in which several operators could, or might, participate for all or part of time alleged. It was alleged to be a tri-partite affair essentially to split the Government business three ways. If it existed at all it necessarily had to be tri-partite because agreement by Alamito and Beatrice on prices at Air Base would be valueless unless Roberts agreed not to upset it; agreement by Beatrice alone with Roberts to "allocate" to the latter the Hospital business would be ineffective without the concurrence of Alamito in the supposed "allocation." The case had to stand on a tripod or it could not stand at all.

Roberts and Alamito, to avoid the hazard of litigation, pleaded *nolo*. Beatrice pleaded not guilty.

On the trial, officials of Roberts and Alamito were called as Government witnesses but did not support the Government's theories; they denied the existence of the asserted conspiracy. At the close of the Government's evidence Beatrice stood on its motion for acquittal. The jury returned a verdict of guilty. Post trial motions were overruled and petitioner was fined $15,000.

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1. Under practice of the 8th Circuit the record was not printed for use of the Court of Appeals and has not been printed for this application. Such particular material as it is believed the Court may wish to examine in connection with this petition is printed as Appendices hereto.

THE EVIDENCE.

The Government produced no evidence of any meeting or agreement between defendants with respect to the Air Base or Veterans Hospital business which was awarded on sealed bids.

On the contrary, the Government produced the wholesale manager of Alamito, who testified that he determined what Alamito's bids would be, that he never knew what his competitors were going to do, and that he attended bid openings to find out what they had done (R. 99-103). A member of the Executive and Pricing Committees of Roberts testified it made its general prices without consultation with anyone (R. 177). With respect to the failure of Roberts to bid for Air Base business during and *after* the indictment period, the Government's own evidence showed that immediately preceding the alleged conspiracy period a dispute developed between Roberts and the Air Base over the latter's practices of taking what Roberts believed to be unearned "cash discounts" (R. 198-199); that thereupon Roberts ceased bidding for the Air Force business although it continued to seek business with the Veterans' Administration.

The Government's case was based on (a) the contention that the alleged "pattern" of bidding was a circumstance tending to indicate collusion; (b) an alleged declaration (hearsay and outside the presence of petitioner), by a deceased route manager of Alamito, not shown to be a policy maker of that company, made to one Vavra that it was the "policy" of "the companies" to rotate the Air Base business; (c) two conversations, over two years after the supposed conspiracy supposedly had been in operation, between a Roberts manager and a Beatrice manager that "had to do with matters affecting the area generally and * * * not directed specifically to business at the Base and the Hospital" (Op. p. 50, *infra*).

The history of the bidding is in the two following tabulations:

Offutt Air Force Base

TRADE DISCOUNTS BID***

Successful Bidder Underscored.

Period	Alamito	Beatrice	Roberts	
2- 1-51 to 8-31-51	0%	0%	0%	
11- 1-51 to 2-29-52	0%	3½%	0%	
3- 1-52 to 8-31-52	0%	0%	0%	
4-21-52 to 8-31-52	0%	2%	1%	
9- 1-52 to 2-28-53	0%	No Bid	0%	
3- 1-53 to 8-31-53	0%	2%	0%	
9- 1-53 to 11-30-53	0%	2%	2%-2% cash (3.96%*)	
12- 1-53 to 2-28-54	0%	5%	2%	
3- 1-54 to 5-31-54	2%	0%	0%	Asserted Conspiracy Period
6- 1-54 to 8-31-54	2%	0%	0%	
9- 1-54 to 11-30-54	0%	2%	0%	
12- 1-54 to 2-28-55	0%	2%	0%	
3- 1-55 to 5-31-55	2%	1%	0%	
6- 1-55 to 11-30-55	2%	1%	0%	
12- 1-55 to 5-31-56	1%	2%	0%	
6- 1-56 to 11-30-56	2%	1½%	0%	
12- 1-56 to 5-31-57	1%	2%	0%	
6- 1-57 to 11-30-57	2%	1%	0%**	
12- 1-57 to 5-31-58	1¼%	0%	0%	
6- 1-58 to 11-30-58	0%	0%	0%	

* Incorrectly Appears on All Government Charts as 4%.

**On 1 Item Roberts Bid 6% and Was Awarded Partial Contract.

*** Cash Discounts 30 Days or Over Considered Trade Discounts.

VETERANS HOSPITAL

TRADE DISCOUNTS BID*****

Successful Bidder Underscored.

Period	Alamito	Beatrice	Roberts	
4- 1-51 to 6-31-51	0%	4½%	0%	
7- 1-51 to 9-31-51	0%	0%	0%	
10- 1-51 to 6-30-52	0%-10½ cash	7½%	0%	
7- 1-52 to 9-31-52	0%	0%	1%	
10- 1-52 to 12-31-52	No Bid	1%	0%	
1- 1-53 to 3-31-53	0%	0%	0%	
4- 1-53 to 6-30-53	0%	1%	2%	
7- 1-53 to 9-31-53	3%	0%*	0%	
10- 1-53 to 12-31-53	0%	5%	0%	
1- 1-54 to 3-31-54	0%	5%	2%	
4- 1-54 to 6-30-54	0%	0%	2%	
7- 1-54 to 12-30-54	No Bid**	No Bid**	1½%***	Asserted Conspiracy Period
1- 1-55 to 6-30-55	No Bid**	1%	2%	
7- 1-55 to 12-31-55	No Bid	No Bid	2%	
1- 1-56 to 3-31-56	0%	0%	2%	
4- 1-56 to 6-30-56	0%	0%	2%	
7- 1-56 to 12-31-56	No Bid**	0%	2%	
1- 1-57 to 6-30-57	No Bid	0%	2%***	
7- 1-57 to 6-30-58	2½%****	No Bid	No Bid	
7- 1-58 to 9-30-58	No Bid	5%	No Bid	

* Bid 2% Alternate Period.

** Bid 0% Alternate Period.

*** 1½% For 6 Mo. Rather Than 2% for 12 Mo. Accepted.

**** One Item at No Discount.

***** Cash Discounts 30 Days or Over Considered Trade Discounts.

In addition, the Government was permitted, over objection, to show bids defendants and others had made at two Omaha hospitals showing different competitors and lower net prices than those offered the Government installations. The Government statistician admitted he did not know whether the private business in fact was comparable or whether the Government was seeking to compare "an apple and an orange" (R. 300-302); there was no proof that the volume of business, times and manner of delivery, validation of delivery tickets, etc., required by the elaborate Gov-

ernment contracts, pertained to this private business. Nevertheless, the evidence was permitted to go in. The bids showed that at least three dairies which did not wish to bid for the Government business did bid for that of the Omaha hospitals. Tabulation of these bids showed:

DISCOUNTS FROM WHOLESALE LIST PRICES OFFERED AND SUCCESSFUL BIDDER TO UNIVERSITY HOSPITAL

JUNE 16, 1954 THROUGH JUNE 15, 1957.

Contract Period	Goodrich	Roberts	Alamito	Beatrice
6-16-54 to 12-15-54	14.2%*	5%	15%	no bid
12-16-54 to 6-15-55	18.5%*	12½%	0%	6½%
6-16-55 to 12-15-55	15.6%**	15%**	0%	10%
12-16-55 to 6-15-56	12.8%*	0%	11%	10%
6-16-56 to 12-15-56	12.8%*	0%	10%	5%
12-16-56 to 6-15-57	11.2%***	0%	10%****	10%****

* Awarded contract.

** Awarded one-half contract.

*** Awarded contract except for two items.

**** Awarded contract for one item. (Ex 37A-37F)

DISCOUNTS FROM WHOLESALE LIST PRICE OFFERED TO ST. JOSEPH'S HOSPITAL

Date	Royal	Goodrich	Grobeck	Roberts	Alamito	Beatrice
1954 1st half	10%-12½%	12½%*	12½%	8%-13%	0	2%
1954 2nd half	10%	12½%*	12½%	up to 10%	0	2%
1955	10%	10%*	12½%	12% +	no bid	no bid
1956	10%	10%*	15½%	up to 10%	10%	10%
1957	10%	10%*	15½%	0	no bid	10%

(Ex 38A-38L)

* Approximately.

It will be observed from these tabulations that other dairies which did not bid at all for the Government business believed the Omaha hospital business highly desirable and bid steep discounts to obtain it.

GENERAL MARKET CONDITIONS.

A federal milk marketing order required defendants to pay identical prices for raw milk (R. 132-134). *General retail and wholesale prices (on milk and cream) in the Omaha area were uniform before, during and after the period of the asserted conspiracy at the Government installations and the Grand Jury did not allege that the general uniformity was wrongful.*

Nonetheless, on trial the Government proved (over objection), that one Zinsmaster, Sales Manager of Roberts, telephoned one Klesath, then Omaha Manager for petitioner, in late July 1956 (over two years after the supposed conspiracy as to the Government installations supposedly had been formed), and:

> "* * * told me [Klesath] that, 'due to the increase in our cost for fluid milk in the market that we would have a general over-all price increase of one cent a quart on retail and wholesale,' * * * and I told him that I would prepare my prices and be ready to go up on August 1st." (R. 77.)

That just before Christmas 1956,

> "Zinsmaster told me that on January first we would change our wholesale price from ten to twelve per cent to give the grocers a larger margin of profit. I told him I would figure my wholesale price to meet with theirs." (R. 78.)

Whatever these conversations may have meant, or however they may be construed, they patently do not pertain to the asserted conspiracy for which petitioner was indicted and the Court of Appeals so recognizes (p. 50, *infra*).

In arguing to the jury the prosecutor departed entirely from the indictment. He repeatedly asserted that the Government had proved crimes not alleged in the indictment

and did so in context to lead the jury to believe such other asserted crimes were "the" alleged:

> "Mr. Klesath's testimony is some of the most remarkable testimony ever to fall from the lips of a witness in the trial of an anti-trust case. *Here is direct, positive evidence of a price fixing on the wholesale price of milk in a market.* (R. 330.) * * *
>
> "*The crime in this instance is the fixing of prices.*
>
> "The Supreme Court has declared that an agreement to fix prices with a competitor is illegal. *That is the crime.*
>
> "* * * They were going to fix the price of milk on August 1st *in this market*, and *therefore they violated the Antitrust Law.* (R. 332.)
>
> "But to fix it once was not enough. In December of 1956, the same year, Mr. Klesath received another telephone call from Mr. Zinsmaster. This occurred shortly before Christmas, to scheme and plan to increase the price of milk in the Omaha market on January 1, 1957, and on this occasion not only was the wholesale price of milk to be increased but the stores had been complaining, and they also increased the discount from ten to twelve per cent, which in effect, of course, lowered the price of milk to the stores.
>
> "Ladies and gentlemen, *this is another blatant price fixing upon the part of these two men.* Both represented defendants in this case, Roberts and Beatrice." (R. 333.)

INSTRUCTIONS.

The Court of Appeals opinion fails to set forth the instructions. We include them as Appendix B and, to aid analysis, print in bold face the many portions which authorize or direct conviction on charges or theories not made in the indictment. Although three of the instructions correctly informed the jury that petitioner was indicted for allegedly conspiring with two other dairy companies to allocate contracts and maintain non-competitive prices at the two Government installations, in at least ten other places

(leaving out of count incidental references), the jury was told that petitioner was charged with conspiring to fix prices generally on dairy products "in the Omaha area" (R. 381-386); one instruction told the jury that such was "the main charge." A peremptory instruction directed the jury:

> "If you determine that defendant agreed or conspired to fix, stabilize, or control prices, or agreed to maintain uniform and non-competitive prices on dairy products in interstate commerce in the Omaha area, you must find them [sic] guilty notwithstanding the motives or purposes of the defendant in so agreeing or acting." (R. 384, *infra* pp. 69-70.)

At least five times abstract instructions told the jury that a conspiracy to maintain uniform prices was illegal (R. 376, 382, 384, 385; see p. 68 *et seq.*, *infra*). Conversely, the Court denied petitioner's request for an instruction which would have told the jury:

> "The issue in this case is solely whether the Government has proved the defendant guilty of the particular conspiracy defined in the indictment. Evidence, if any, of any other or different conspiracy, is immaterial to the issue you are to decide. The price of milk to the housewives in Omaha or to the grocery stores or other institutions is not in issue in this case." (Court File pp. 214, 215, 78-79, *infra*.)

MOTION TO DISMISS BECAUSE INDICTMENT IMPROPERLY OBTAINED.

Before trial petitioner presented a sworn motion based upon voice recorded statements made by three of the witnesses before the grand jury immediately after their appearances in which they detailed how the prosecutor, in interrogating them, had accused them of perjury when they denied any "deal," repeatedly had asserted there was in fact a conspiracy, that it was an "open and shut" case, and otherwise had invaded the jury's province of determining

whether the witnesses were truthful and whether there was probable cause for believing any crime whatsoever had been committed.

These almost contemporaneously recorded statements were as accurate a description of the occurrences as possible to provide save for minutes of the jury. It was prayed that they be produced and that the indictment be dismissed. The Court failed to rule upon the motion, let the case go to trial, and after verdict denied the motion on the ground that he had examined the minutes *in camera* and determined they did "not support" the motion. At no time either before, during, or after trial, did the prosecutor who handled the grand jury proceedings and participated in the trial deny the allegations of the motion.

COURT OF APPEALS OPINION.

The Court of Appeals held that "although some might regard the case as not a strong one" (op. p. 49, *infra*),

(1) the naked bid pattern at the Government installations, as contrasted with the naked bid patterns at the private hospitals, coupled with the evidence as to the Klesath conversations as to the area generally, was sufficient to overcome the Government's own direct evidence denying the asserted conspiracy given by Alamito's Wholesale Manager and partially given by the Roberts official, and would authorize a jury to find defendant guilty "because [the latter] was not so affirmatively adverse as to necessitate an acquittal";

(2) it could not say that the instructions, although repeatedly authorizing a guilty verdict if the jury believed defendant guilty of any anti-trust offense in the Omaha area, "did not adequately present the issues in a form understandable to the jury";

(3) the trial court would not have abused its discretion had it refused to examine the grand jury minutes,

therefore its *in camera* study of them and resulting denial of the motion to dismiss the indictment did not constitute a secret reception of evidence, a denial of due process, or a deprival of the confrontation guaranty of the Sixth Amendment.

REASONS FOR GRANTING THE WRIT.

This case, in totality, presents, on a simple record, the fundamental question of whether one criminally accused of violating the anti-trust laws has fewer protections in criminal procedures than those accused of other crimes.

Thus the point here as to the prosecutor's misconduct before the grand jury was finally disposed of on the ground, "*in view of the antitrust character of this case [we find nothing] prejudicially offensive to the ends of justice.*" (p. 42, *infra*.) This, despite the fact that the Court of Appeals, after reading the grand jury minutes, was unable to find that in fact the prosecutor had not accused witnesses of perjury, violently commented on their credibility and done other things normally regarded as improper.

And so with other points: the Vavra testimony as to what was said to him by a dead man not shown to have been in a position of relevant authority in an asserted co-conspirator company is held admissible (p. 55, *infra*); yet the Court of Appeals rightly is so unsure of that ruling as not to be willing to rely on the testimony in deciding whether there was sufficient evidence to support the verdict (p. 49, *infra*). Instead, and incongruously, it relies on the Klesath conversations (p. 50, *infra*) which it agrees did not pertain to the "very confined" conspiracy alleged but to area practices (p. 50, *infra*) not claimed to be unlawful, which well could be innocent, and must, in this case, be so presumed.

Instructions which repeatedly authorized or directed conviction on grounds wholly outside the "very confined"

indictment are excused, in substantial part, because this was "a complicated criminal case"; but it was not so until the District Court composed a charge which complicated it by roaming the fields of anti-trust and conspiracy law generally rather than hewing to the "very confined" conspiracy alleged.

In a circumstantial evidence case not even lip service is paid to the rule that the circumstances must be inconsistent with any reasonable hypothesis of innocence. That such hypothesis would be reasonable on this record is shown by the Court of Appeals' statement, "* * * it might have been possible for us to decide the issue otherwise" (p. 50, *infra*).

The Government's burden of proving a defendant guilty beyond a reasonable doubt in any criminal case, anti-trust or otherwise, is not even considered. (*Brinegar* v. *United States*, 338 U. S. 160, 174.) Instead a new, undefined, and lower standard, wholly alien to federal criminal law, is applied in weighing the Government's evidence, *i.e.*, was it "*so affirmatively adverse* [*to the Government's contention*] *as to necessitate an acquittal*" (p. 49, *infra*)? This seems to say that in a criminal case a defendant must prove his innocence. Whatever the "*affirmatively adverse*" doctrine may precisely mean, it was applied, and its application was an inroad into the standard of proof beyond a reasonable doubt. The doctrine is out of accord with the teaching of this Court in *Holland* v. *United States*, 348 U. S. 121, 138 that the Government must always prove every element of an offense beyond a reasonable doubt. The matter is one of serious importance meriting this Court's examination.

The "*affirmatively adverse*" ruling is coupled with the Court's observation (p. 54, *infra*) "that Beatrice has made no record," scarcely an accurate description of the fact that Beatrice stood on its motion for acquittal. How-

ever that may be, implicit in the opinion, is the motif that as long as there was *anything* in the record against Beatrice, whether it established guilt beyond a reasonable doubt or not, Beatrice stood mute at its peril. This, we suggest, comports neither the law nor the record. If the record, at the close of the Government's case did not establish guilt beyond a reasonable doubt, there was no reason for Beatrice to go ahead and its failure so to do could not create an inference against it. Moreover, the Government asked the jury to believe respectable officers of Alamito and Roberts who effectively denied the asserted conspiracy—with the Government thus showing that Alamito and Roberts did not engage in the asserted conspiracy, the case collapsed.

Without arguing the points (they can be explored properly only if the writ be granted), we submit it is a certainty that similar rulings would not have been made in a Mann Act or narcotics case. Explicit and implicit in the instant opinion is the theme "*in view of the antitrust character of this case*", normal standards of criminal procedure and evidence may be relaxed. This Court has never so held. Such a doctrine should be stamped out before it spreads to result in other unjust convictions, personal or corporate, in the many criminal anti-trust cases now pending. Persons accused of business crimes are as entitled to fair treatment as those accused of white slavery or subversion.

We suggest that because of the increasing frequency of criminal anti-trust cases it is in the best interest of the federal court system that this case, in which several facets of the basic problem are presented clearly in a relatively concise and uncomplicated record, be reviewed.

We believe the proper rule to be that when the Anti-

trust Division resorts to criminal proceedings it must accept, and be held to, normal standards of criminal procedure and proof. The Division heretofore has obtained, and can continue to obtain (where warranted), convictions on that basis. If, as here, it procures only a "very confined" indictment, its proofs, arguments and jury instructions must similarly be "very confined," so that the citizen is not placed in peril of conviction on other matters; its proof must show guilt beyond a reasonable doubt. It is not up to a defendant to produce evidence "*affirmatively adverse*" to the Government's contentions unless the latter be established beyond a reasonable doubt.

Sherman Act convictions are dire matters. Not only may they result in imprisonment as well as heavy fines, but they carry the additional consequence, not present in most criminal situations, of creating, under Section 5 of the Clayton Act, a *prima facie* case for treble damage civil liability. Strong reason exists, therefore, for examination of the instant unsettling opinion and for announcement of clear rules emphasizing the necessity of adherence to, rather than relaxation of, traditional criminal standards in antitrust prosecutions.

I.

The Court of Appeals has departed entirely from the substantive standards laid down in *United States* v. *Borden*, 347 U. S. 514. Borden was a *civil* case in which the Government, as here, contended that a "pattern" of bidding for public business in dairy products established collusive bidding in violation of the Sherman Act. Additionally, the Government there adduced evidence that in a few instances some dairies were told by others not to bid for certain business. (This element not present here.) The District Court held against the Government (111 F. Supp. 562). On appeal the Government conceded its case, as made, was insufficient but contended certain evidence had erroneously been ex-

cluded which would have established a Sherman Act violation. This Court held that even had the additional evidence been received it would not establish a case; *a fortiori* the same result should follow in this, a criminal case. (Cf. *Theatre Enterprises, Inc.*, v. *Paramount Film Distributing Corporation*, 346 U. S. 537, 541: "Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely.")

Moreover, the Government here produced and vouched for Prall, Alamito's sales manager who testified that he decided on Alamito's bids; because he never knew what his competitors were going to do he attended bid openings and took with him scratch or tally sheets by which he could follow and record the bids. This evidence, true and uncontradicted, cut the heart out of the asserted conspiracy. When there was utterly no evidence of conspiring by either Alamito or Roberts as to the Government business there simply was no one left for Beatrice to have conspired with. Under the evidence, and *Borden*, acquittal should have been directed.

Although the Court of Appeals *describes Borden* at some length (pp. 51-53 *infra*), it never suggests on what tenable ground it may be distinguished; nor how, if a *civil* case was not made in *Borden*, a *criminal* one of proof beyond a reasonable doubt was made here; nor how the Government may proffer Prall as a believable direct witness that there was no conspiracy and simultaneously rely on equivocal circumstantial evidence, insufficient under *Borden*, to make a liar of him.

The opinion makes an argument to the effect that the naked bid "pattern" may be read as indicative of conspiracy. But not a syllable of economic or expert testimony was offered that the bids were inconsistent with competitive be-

havior by men of varying business judgment. On the face of the naked figures it would be fully as logical to say that the parties were in a conspiracy in 1951 and 1952 when twice all three refused to offer any discount, or in 1953 when on one occasion Beatrice put in no bid whatsoever and Alamito and Roberts offered no discount.

The Government itself proved that in late 1953 Roberts got into a dispute with the Air Force over its practice of taking what Roberts believed to be unwarranted cash discounts; ample reason was shown for Roberts not to do business with the Air Force for some time thereafter. The opinion says that the non-existent conspiracy must have ceased with the bids for the period commencing June 1, 1957, (and here the opinion shifts its system of accounting from entire to partial contracts), because at that time, although Alamito bid 2% for the *entire* contract and Beatrice bid 1% Roberts bid 6% (not 8% as erroneously stated in the opinion), *for a portion of the contract*—milk in gallons. The conclusion is obviously pure guess work.

The vice of the situation is supposed to adhere in the fact that commencing March 1, 1954, Alamito had the Air Base for six months, Beatrice then had it for six months, Alamito got it for six months, then Beatrice took it away for a quarter. In the following quarter it swung back to Alamito, then it went to Beatrice. Since the supposed conspiracy supposedly has been over the principal contract has stayed with Alamito. And by June 1, 1958 no one offered a discount! Such a history rather than showing rigidity or unreality, shows that the business swung back and forth *before and during* the indictment period; that the competitors repeatedly changed positions trying to outguess each other and yet to obtain the business on a profitable basis. The proof is less sufficient to establish conspiracy than it was in *Borden*. We say, *and no witness has testified to the contrary*, that it shows perfect nip and tuck competition.

There can be no bid business on a standard item in which some years after the bidding has taken place, someone cannot go back and say that if A had done this, or B done that, the business would have gone differently. If such divination by hindsight is permitted to take the place of evidence and establish criminal conspiracy, many honest businessmen are in imminent danger of jail.

II.

It is frightening that the jury was not merely authorized to bring in a guilty verdict on grounds—an "Omaha" conspiracy—not alleged in the indictment but was given a preemptory instruction so to do (pp. 69-70, *infra*).

Heretofore it has been constitutional doctrine that permitting, much less directing, conviction on a charge not contained in the indictment should be regarded either as a denial of due process (*DeJonge* v. *Oregon*, 299 U. S. 353, 362; *Thornhill* v. *Alabama*, 310 U.S. 88, 96) or as an amendment of the indictment (*Stirone* v. *United States*, 361 U. S. 212, 217-219) which ever since *Ex parte Bain*, 121 U. S. 1, has been regarded as offensive to the Fifth Amendment. Those principles are set at naught by the instant opinion.

The prices, either of fluid milk or other dairy products on the Omaha general market, were immaterial. The bids to the Government installations which were placed in evidence all contained their own prices in dollar figures and discount terms. Since it was not alleged that these prices were too high or too low with respect to Omaha area prices, reference to the latter was wholly immaterial and improper.

But the Omaha prices were put in (over objection), and they were uniform. The prosecutor put in the Klesath conversations, which the Court of Appeals agrees pertained to area prices and not to the Government installations, and

then repeatedly told the jury that the Omaha prices had been fixed in criminal violation of the very law under which petitioner had been indicted (See p. 10, *supra*). Thus stood the case when the District Court composed its charge. The court permitted counsel to tender instructions but afforded no opportunity for discussion of them, or of the charge before it was delivered. Much grossly misleading and utterly improper material was inserted that neither side had suggested.

The charge contains much improper abstract exhortation, is difficult to follow, and its contradictory instructions admit of no reconciliation. It ties the Klesath conversations into the Government business (p. 67, *infra*) with which the Court of Appeals finds the conversations were not concerned. The Court of Appeals excuses the charge on the ground that the jury probably was not confused. This is neither the legal test nor is it reasonable. We find at least 18 places where the charge travels beyond the indictment to refer to the issue as one "to fix, stabilize, or control prices, or * * * to maintain uniform and non-competitive prices of dairy products in interstate commerce within the Omaha area" (pp. 69-70, *infra*), or as concerning "a combination or conspiracy to fix, control or maintain prices of dairy products in the Omaha area" (p. 70, *infra*), etc. At other places the jury was told it must find beyond a reasonable doubt *not that the conspiracy alleged in the indictment was proved* but that "*a*" conspiracy existed. As against at least 18 of these variations we make only 7 instances in which the jury, one way or another, was directed to the actual charge of the indictment.

In *Bollenbach* v. *United States*, 326 U. S. 607, 613 this Court said:

> "* * * Here then are three different and conflicting theories regarding a charge designed to guide the jury in determining guilt, and yet we are asked to

> sustain the conviction on the assumption that the jury was properly guided. * * * A conviction ought not to rest on an equivocal direction to the jury on a basic issue."

The situation at bar is worse. There is reason to think that the District Court itself had become confused for it refused to give an instruction that prices to the Omaha housewife or grocery stores were not in issue (pp. 78-79, *infra*). Paraphrasing from *Stirone* v. *United States*, 361 U. S. 212, 219:

> "* * * because of the court's admission of evidence and under its charge this [believed Omaha dairy products offense] might have been the basis upon which the trial jury convicted petitioner. If so [it] was convicted on a charge the grand jury never made against [it]. This was fatal error."

(*Cf. Grunewald* v. *United States*, 353 U. S. 391, 415; *Yates* v. *United States*, 354 U. S. 298, 312.)

Antitrust cases frequently lend themselves to confusion —the statute is in broad terms but usually is applied against a fairly complex business transaction, only certain features of which are alleged to be illegal. The jury, constitutionally, can bring in a verdict only on those features. In the proper exercise of its supervisory powers we respectfully suggest it would be appropriate for this Court to point out that there is a special duty on trial judges to strive for the utmost clarity of instructions in such cases rather than to stray afield.

III.

That there was error in what should have been a relatively simple trial the Court of Appeals agrees. However, it says no single error was sufficiently prejudicial to require reversal. We respectfully disagree. But it is clear that the Court ignored entirely, and failed to assess,

the cumulative effect of a chain of errors. It departed from the standard of *Kotteakos* v. *United States*, 328 U. S. 750, 764 that it "must take account of what the error meant to [the jury], not singled out and standing alone, but in relation to all else that happened."

Nor did the Court of Appeals give any consideration to the accepted doctrine that errors which might not require reversal in a clear case, require it in a close one which might have gone either way as the Court says was the fact here (p. 50, *infra*). The Court of Appeals has fallen into the same error in assessing prejudice as it did in *Janko* v. *United States*, 281 F. 2d 156 where it held newspaper publicity was not prejudicial. This Court reversed on the petition for certiorari (366 U. S. 716). Let us list some of the prejudicial errors here:

1. Major Anderson, handsome and in uniform, testified that his secretary said on the occasion of a bid opening, "I wonder whose turn it is today; these bids are rotated among the firms" (R. 139-140). This was given, at the prosecution's peril, after strenuous objections. There was no possible way by which it could be made competent. Nevertheless, the prosecutor persisted. The viciously prejudicial accusation was made. It was then stricken. The Court of Appeals says that is a sufficient cure. However, that, "all practicing lawyers know to be unmitigated fiction." (*Krulewitch* v. *United States*, 336 U. S. 440, 453.)

2. One Vavra, a one-time route driver for Alamito Dairy, testified, over objection, that his deceased former supervisor McCarthy had told him it was the policy of Alamito and Beatrice to switch the Air Force business every six months (R. 210-212). No foundation was laid to show that the deceased McCarthy ever had been in position to determine or to know what the "policy" of his own employer, Alamito, was, and certainly not that of Beatrice. McCarthy himself, if alive, could not have given this evidence even as against *Alamito* for his authority was

not shown, nor was the declaration one in furtherance of the conspiracy. (*Fiswick* v. *United States*, 329 U. S. 211, 217; *Lutwak* v. *United States*, 344 U. S. 604, 617; *Flintkote Company* v. *Lysfjord*, 246 F. 2d 368 (9 Cir., 1957), c.d. 355 U. S. 835.) But here it was held admissible in double hearsay form against *Beatrice* on the theory that there was unspecified "independent proof" of the asserted conspiracy (p. 55, *infra*). This scarcely disposes of the point that there was no proof sufficient to show McCarthy was in a position of relevant authority to make admissions which would have been admissible even as against Alamito. Apparently the "independent proof" which would justify admissions of a qualified agent of alleged co-conspirator Alamito is the Klesath-Zinsmaster conversations; however, *those did not pertain to the conspiracy alleged but to area practices.*

3. The Klesath conversations are construed to prove that Beatrice and Roberts agreed to fix general prices to Omaha housewives and retailers. We demur; but in any event the Court of Appeals held these conversations did *not* pertain to the asserted conspiracy at issue. This evidence again should not have been received.

4. In any event petitioner was faced with (a) an inadmissible declaration by an Air Force secretary that "the firms" rotate bids; (b) a so-called admission by an unqualified dead man that his employer, Alamito, and Beatrice had a "policy" of shifting the Air Force business; (c) an alleged "Omaha" price-fixing conspiracy not alleged in the indictment; (d) a vehement argument by the prosecutor that the "Klesath evidence as to Omaha was some of the most remarkable testimony ever to come from the mouth of a witness in an anti-trust case" and showed "blatant" crimes, or "the" crime; (e) instructions from the trial court repeatedly authorizing and directing the jury to return a verdict of guilty on an "impermissible ground." (*Cf. Grunewald* v. *United States*, 353 U. S. 391, 415.)

The cumulative effect of a continuous chain of prejudicial errors was bound to, and did, result in a verdict against petitioner. Due process may not require an error-free trial but it does require that the sum total of a chain of error, in what at best was a close case for the Government, be considered in determining whether a trial was fair (*Kotteakos* v. *United States*, 328 U. S. 750, 764). However, nowhere did the Court of Appeals do this. In failing so to do it has departed so far from accepted standards of judicial review as to warrant supervisory review by this Court.

IV.

The opinion cites many cases dealing with generalities as to grand juries but avoids the real problem here:

An affidavit was filed, not in general terms but averring specifically and in detail, that three specific witnesses had been accused of perjury, or other misconduct, by the prosecutor before the grand jury and that the grand jury repeatedly had been told by the prosecutor that crime in fact had been committed. If this was true, the indictment should have been dismissed. *United States* v. *Wells*, 163 F. 313, 325-326. The prosecutor made no denial whatsoever of the charges against him, nor did he assert, until long after the trial, that the affidavit was any form of hearsay (a debatable question, *cf. Meyer* v. *T. J. McCarthy Steamship Company*, 183 F. Supp. 654, 657).

Production of the minutes covering testimony of the three witnesses would have settled the matter. They were not produced. Instead the District Court read them secretly and announced that they did not support the motion. On appeal, the minutes of course, were not part of the record. The Court of Appeals sent for, and read them. It then found, not that the prosecutor had not done precisely what he was charged with, but that it found nothing in the grand

jury proceedings "which, in view of the anti-trust character of this case, is prejudicially offensive to the ends of justice" (p. 42, *infra*). What the court's finding means, what standards the Court applied, no one, under this Star Chamber procedure, can have any possible idea.

Certainly the opinion is consistent with the view that in anti-trust proceedings prosecutors *can* tell grand juries that witnesses are lying and *can* tell them that crime has been committed.

Evidence has been received and weighed against petitioner in violation of its right under the Sixth Amendment to be confronted with the evidence against it and in violation of the due process guarantee of the Fifth Amendment.

CONCLUSION.

It is respectfully submitted that the Government's case fell so far short of proving the commission of a crime beyond a reasonable doubt that this Court may believe it appropriate on this petition to reverse the judgment with directions for entry of one of acquittal. Certainly if that not be done, such grave questions are raised that the petition should be granted.

Respectfully submitted,

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February 12, 1963.